

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

OMAHA POLICE OFFICERS)
ASSOCIATION,)
)
Petitioner,)
)
CITY OF OMAHA, a municipal)
Corporation, CHIEF OF POLICE,)
TODD SCHMADERER, and JEAN)
STOTHERT, mayor City of Omaha,)
)
Respondents.)

Case No. 1401

FINDINGS AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

FEB 12 2016

CLERK

APPEARANCES:

For Petitioner

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For Respondent

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Before Commissioners Pillen, Carlson and Blake

NATURE OF THE CASE

On August 15, 2015, the Omaha Police Officers Association (“Union” or “Petitioner”) filed this action with the Commission, alleging that the City of Omaha (“City”), Todd Schmaderer, and Jean Stothert (“Mayor”) (or collectively “Respondents”) committed a prohibited practice in violation of the Nebraska Industrial Relations Act (“Act”) § 48-824(1) and (2). Petitioner alleges the violation occurred when the Mayor sent an email regarding the City’s bargaining proposals to each member of the Union bargaining group. An Amended Petition was filed August 18, 2015. A trial was held December 9, 2015, before the Honorable Sarah S. Pillen.

FACTS

The Commission hereby accepts the following facts as true pursuant to the Stipulation entered into by the parties. (Ex. 506). The Petitioner is a labor organization as defined in Neb. Rev.

Stat. §48-801 and is the duly recognized bargaining group for the unit of police officers, sergeants, lieutenants, and captains employed by the City and has in force a collective bargaining agreement (“CBA”) with the City covering such collective bargaining group. The City is a municipal corporation and employer within the meaning of Neb. Rev. Stat. §48-801. Jean Stothert is the duly elected Mayor of the City and in such capacity is responsible for negotiating and maintaining the collective bargaining relationship with the Union as a result of the delegation of such responsibility by City Council. The City and the Union adopted procedural rules to control their negotiations for wages and terms and conditions of employment on April 18, 2014. The City knew the composition of the Union’s bargaining representatives at that time.

The City Council, after a public hearing, approved a Final Offer to the Union by Resolution No. 934 on July 21, 2015. Union members were asked to participate in twelve informational meetings led by the Union to discuss the City's last best and final offer between July 30, 2015 and August 4, 2015. (Ex. 7). On August 3, 2015, the Mayor sent a letter by group email to each member of the Union bargaining group, including the bargaining representatives. (“Email”) (Ex. 8). On August 14, 2015, the City filed a Petition with the Commission of Industrial Relations against the Union to establish wages and terms and conditions of employment for 2015. That case is Case No. 1400 and remains pending before the Commission. On August 17 and 18, 2015, the membership of the Union turned down the City's Final Offer by a vote of 527 to 11. On September 15, 2015, the City Council rejected the Final Offer of the Union.

DISCUSSION

Petitioner alleges that Respondents committed a prohibited practice when Respondents bypassed the Union and attempted to engage in direct dealing with represented employees concerning a mandatory subject of bargaining. Further, the Petitioner alleges the actions of the Respondents constitute bad faith bargaining and interference with the union role as the exclusive bargaining representative, and was an attempt to interfere with and undermine the Union. The Commission has been given jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825.

Direct Dealing

Direct dealing occurs when an employer "undercuts" the authority of a collective bargaining agreement by negotiating directly with an individual employee regarding a mandatory subject of bargaining. *Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8 (2002). Under Neb. Rev. Stat. § 48-824(2) (a), (e), and (f) it is a prohibited practice for any employer or the employer's negotiator to:

- (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;
- (e) Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act; and
- (f) Deny the rights accompanying certification or recognition granted by the Industrial Relations Act.

Neb.Rev.Stat. § 48-824 (a), (e), and (f).

Decisions under the National Labor Relations Act (NLRA) are helpful in interpreting the Nebraska Industrial Relations Act, but are not binding. *Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 22 (2002). The United States Supreme Court has held that bypassing a certified or recognized collective bargaining agent and dealing directly with a represented employee concerning a mandatory subject of bargaining, such as wages and other terms and conditions of employment, violates NLRA § 8(a)(1) and (5). *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Phalo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

The Nebraska Supreme Court adopted the three-part test set out in *Permanente Medical Group, Inc.*, 332 N.L.R.B. No. 106 (Oct. 31, 2000) to determine whether direct dealing occurred.

“[T]he NLRB identifies the elements of direct dealing as follows: (1) The employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing wages, hours, and terms and conditions of employment or undercutting the collective bargaining unit's role in bargaining; and (3) such communication was made to the exclusion of the collective bargaining unit.”

Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002, 265 Neb. 8, 22 (2002).

The first and third part of the test set out above can be quickly addressed. As to the first part, there is no dispute that the Respondents communicated directly with union-represented employees. As to the third part, the Email was sent to all Union members, including the bargaining representatives, so the communication was not made to the exclusion of the collective bargaining unit. The Commission need not address the second prong which relates to the purpose of the communication as it is not necessary to the disposition of this case. All three prongs must be present; therefore the Commission finds that direct dealing did not occur.

Petitioner specifically alleges that Respondents attempted to interfere with the Union's role as the exclusive bargaining representative, and undermine the Union; or in the language of the *Permanente Medical Group* test, undercut the collective bargaining unit's role in bargaining. Respondents argue that they are allowed to express their views under Neb. Rev. Stat. § 48-824(4). This is a case of first impression for the Commission applying Neb. Rev. Stat. § 48-824(4). Neb. Rev. Stat. § 48-824(4) is substantially similar to the NLRA's § 8(c), codified at 29 USCS § 158(c); therefore decisions interpreting § 8(c) are instructive.

(4) The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, is not evidence of any unfair labor practice under any of the provisions of the Industrial Relations Act if such expression contains no threat of reprisal or force or promise of benefit.

Neb. Rev. Stat. § 48-824(4).

(c) Expression of views without threat of reprisal or force or promise of benefit. The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 USCS § 158.

The Commission finds the reasoning in *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867 (4th Cir. 1999) applying 29 USCS § 158(c) particularly applicable to the instant case.

"An employer is ... free to communicate its views "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). ... Drawing the line between an employer's freedom to speak and direct dealing produces a relatively straightforward standard

of permissible conduct. An employer may speak freely to its employees about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position, and objectively supportable, reasonable beliefs concerning future events. (Internal citations omitted) But, under § 8(c) the employer cannot act in a coercive manner by making separate promises of benefits or threatening employees. Thus the employer may freely communicate with employees in noncoercive terms, as long as those communications do not contain some sort of express or implied quid pro quo offer that is not before the union. See, e.g., *Selkirk Metalbestos v. NLRB*, 116 F.3d 782, 788 (5th Cir. 1997) (noting that the promise of benefit need be only reasonably inferable from the conduct); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 943 (3d Cir. 1980) ("It is firmly established that an employer violates section 8(a)(1) by his solicitation of grievances, if accompanied by an express or implied promise to remedy the grievance . . ."). This standard recognizes the right of represented employees to negotiate exclusively through the union, while protecting the right of employers to tell their side of the story."

Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB, 164 F.3d 867, 875 (4th Cir. 1999).

The Commission received into evidence the affidavits of Mayor Stothert and John Wells, President of the Union (Ex. 500 & Ex. 14). As there was no live testimony, there was no opportunity for the Commission to observe the affiants or to hear cross examination. The Mayor attests that her email was "intended to provide a fact-based description of the City's last and best offer" and "to make sure that people had correct information as they moved forward." (Ex. 500). Mr. Wells attests his belief that the Mayor "went beyond simply expressing a view, argument or opinion without the threat of reprisal, force or promise of benefit." (Ex. 14).

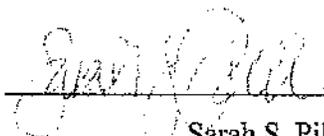
The Commission received insufficient evidence to support a finding that the Mayor's email was an attempt to undercut the collective bargaining unit's role in bargaining. Further, the Commission is not persuaded that the email contained a threat of reprisal, force, promises of benefit or coercion on the part of the Respondents. The email does not contain an express or implied quid pro quo offer that is not before the union. The Commission finds that the Mayor's Email was not direct dealing, but a permissible expression under Neb. Rev. Stat. § 48-824(4).

IT IS THEREFORE ORDERED that:

1. The Petition is hereby dismissed.

Entered February 12, 2016.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Sarah S. Pillen, Commissioner